IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1763 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MUKESHBHAI HAMIRBHAI RAJGOR

Versus

SATISHBHAI PRABHUDAS KANJARIYA

Appearance:

1. Civil Revision Application No. 1763 of 1999

MR HN BRAHMBHATT for Petitioner No. 1

MR RE VARIAVA for Respondent No. 1

CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 23/04/2003

ORAL JUDGEMENT

1. The petitioner filed H.R.P. Suit No. 1144 of 1999 for declaration and permanent injunction restraining

the defendant from forcibly taking possession of the suit premises. Along with the said suit an application exh. 5 was filed by the plaintiff. The trial Court rejected the application exh. 5 vide order dated 7-10-1999 holding that the plaintiff has miserably failed to establish even prima facie case and the balance of convenience is also not in favour of the plaintiff. Against the rejection order dated 7-10-1999 of the trial Court, the petitioner preferred Appeal From Order No. 127 of 1999 before the Appellate Bench of Small Causes Court, Ahmedabad and the said appeal was also dismissed at admission stage vide judgment and order dated 2-11-1999. Hence, the present revision application is filed before this Court by the original plaintiff.

2. In the present case documentary evidence has been produced by both the parties and the same has been considered and appreciated by the Courts below. Rightly or wrongly the findings recorded on the basis of the documentary evidence by the trial court and confirmed by the Appellate Bench, this Court cannot reappreciate the documentary evidence produced by the parties before the courts below in order to arrive at different finding.

3. Learned counsel for the petitioner contended that the Court Commissioner was appointed and he has submitted the report dated 21-9-1999 and that report of the Court Commissioner has not been considered by any the Courts below and according to him the said report shows the possession of the petitioner over the property in dispute.

4. I have carefully considered the submissions made by the learned counsel for the parties and material on record. The lower Appellate Court has held that the suit was filed on 20-9-1999 by the plaintiff and he started his business in the suit property on 28-7-1999 and religious ceremony was performed on 27-7-199 in that respect. A police complaint was lodged by the plaintiff on 31-7-1999. The Courts below have scrutinized all the documentary evidence produced on record by the parties. The lower Appellate Court came to a conclusion that it cannot be said that the premises was taken on rent by the plaintiff from the defendant and the documentary evidence produced by the defendant shows that defendant has never entered into contract with the plaintiff for giving the suit property on rent and prior date was given by the plaintiff regarding opening of his business. The dates which were given by the plaintiff were not consistent with the documentary evidence produced by defendant. The lower appellate court also scrutinized the tax bills

produced by the plaintiff and it was found by the lower appellate court that nowhere the name of the plaintiff petitioner was mentioned in the said tax bills as occupier of the suit premises. Probability of the presence of the defendant was examined by the lower appellate court in respect of the incident which took place on 31-7-1999. The lower appellate court has also examined all the aspects of the matter and documentary evidence produced by the plaintiff and came to a conclusion that the premises was not taken by the plaintiff from the defendant on rent and confirmed the findings recorded by the trial court.

5. The question before this Court is as to whether the Court Commissioner's report was considered by the Courts below or not. In that respect learned counsel for the respondent contended that the report of the Court Commissioner showing the possession of the plaintiff over the suit property was not brought to the notice of the trial Court and the appellate Court nor this ground was agitated or taken by the plaintiff that he was in possession of the suit property, in the memo of the plaint before the trail Court as well as in the appeal memo before the appellate court and hence the same ground or argument cannot be raised before this Court.

6. I have considered the submissions made by the learned counsel for the parties and the material on record. It appears that the report of the Court Commissioner dated 21-9-1999 is produced on the record. The said Court Commissioner report shows that the plaintiff was present at one of the counter of the suit premises. But in what capacity he was present at the relevant time in the suit property is not coming forward from the said report. Mere presence of the plaintiff at the suit premises does not show that he was in occupation of the suit premises. It appears that due to some fishy reason in the aforesaid report itself hence the plaintiff has not referred same and that argument has also not been advanced before the lower appellate court. Unless that argument was not raised by the plaintiff before the trial court or before the lower appellate court, this Court cannot appreciate that document. As such it appears that mere presence of the plaintiff at one of the counters of the suit premises does establish that the plaintiff was in occupation of the suit premises.

7. Considering the submissions made by the learned counsel for the parties and the material on record, I do not find any good reason to reverse the concurrent findings of the courts below in exercise of revisional

jurisdiction of this Court. Accordingly, this Revision Application is dismissed. Rule is discharged with no order as to costs. Interim relief granted earlier by this Court stands vacated forthwith.

(Kundan Singh, J.)

/JVSatwara/